

NTSB Order No.
EM-177

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of August, 1994

J. W. KIME, Commandant, United States Coast Guard,

v.

FRANK K. LEVENE, Appellant

Docket ME-157

OPINION AND ORDER

Appellant, by counsel, seeks review of a decision of the Commandant (Appeal No. 2551, dated August 27, 1993) affirming a decision and order entered by Coast Guard Administrative Law Judge Jerome C. Ditore on September 25, 1992, following an evidentiary hearing that concluded on September 15, 1992.(1) The law judge had sustained charges of misconduct and violation of

(1) Copies of the decisions of the Commandant and the law judge are attached.

law and had ordered that appellant's Merchant Mariner's License (No. 591358) and Document (No. 113 38 7179) be revoked. As we find that appellant has not established error in the Commandant's affirmance of the law judge's decision, we will deny the appeal, to which the Coast Guard has filed a reply in opposition.

The misconduct charges affirmed by the Commandant are based on findings by the law judge that appellant had, as alleged, assaulted two crew members during a voyage on the S/S Resolute in June 1991. Specifically, appellant was found to have attempted to strangle one crewmember with a wire and to have later on the same date threatened another crewmember by brandishing a metal pipe. The first victim, William P. Jevelis, while sustaining injury to his neck and hands, was able to repulse the attack.(2) The second, Franklin Sesenton, fled from appellant and escaped injury.(3) The violation of law charge upheld by the Commandant stems from the finding that appellant, coincidentally with the assaults, was intoxicated.(4) See 33 CFR # 95.045(b).

(2) Before and after the attack appellant expressed his intent to kill Mr. Jevelis.

(3) It appears that appellant's menacing behavior with the pipe toward Mr. Sesenton resulted from no more than the latter's refusal to help him find Mr. Jevelis, who was at that time being treated for the injuries appellant had earlier inflicted upon him.

(4) The Commandant dismissed a second specification under the violation of law charge that appellant's refusal to be tested for drugs or alcohol use in connection with this incident amounted to a violation of 33 CFR # 95.040. The Commandant concluded that that regulation is "evidentiary in nature and not prescriptive" (Decision at p. 8).

On appeal to the Board, appellant contends only that the sanction of revocation is excessive for the charges found to have been proved, not that the charges were not adequately established by the evidence. We find no merit in the contention, which is largely based on appellant's view that the Commandant mistakenly characterized the assault and battery with the wire as having been unprovoked.⁽⁵⁾ While the evidence supports a belief that appellant and Mr. Jeuelis did not care for one another, and had a heated argument related to their shipboard duties as engineers about a week earlier, we do not perceive in that history, or in any other circumstance appellant has identified,⁽⁶⁾ the slightest justification for the vicious attack on the unsuspecting Jeuelis, who was sunbathing on the vessel's flying bridge when appellant approached to throttle him.'

(5) Appellant did not testify in his own defense, and there is little or no record support for most of his counsel's assertions concerning allegedly provocative conduct by Mr. Jeuelis prior to the incidents at issue here.

(6) The record simply does not support the appellant's claims that Mr. Jeuelis was openly hostile to him, had refused to obey his orders or had "dis-respected" his authority, or that he had exhibited toward appellant "a racially grounded prejudice" (Appellant's Appeal Brief at 13). Mr. Jeuelis, who is white, did admit, however, that while appellant, who is black, was choking him he called him a name which was racially insensitive.

(7) Appellant asserts that Mr. Jeuelis had provoked him with physical attacks resulting in injury to an eye. However, the apparently minor eye injury he refers to was incurred while Mr. Jeuelis was struggling to free himself from appellant's stranglehold. Obviously, whatever blows appellant received during that scuffle could not have prompted an assault already underway.

The sanction of revocation for the assault on Mr. Jeuvellis would be consistent with the Coast Guard's published guidelines for misconduct without regard to consideration of what sanction should be imposed for appellant's assault on the other crewmember and for his intoxication aboard the vessel.(8) Moreover, the Board has recognized that a clear prior record does not preclude revocation for a serious act of violence that could have been lethal. See Commandant v. Keating, 2 NTSB 2654, 2657 (1973). While we appreciate that appellant's conduct may have represented, as he insists, an isolated, out-of-character response to an individual he found insufferable, he has not demonstrated error or abuse of discretion in the Commandant's determination that appellant had revealed a potential for violence that militates against placing at risk the safety and welfare of those with whom he might sail in the future, should he be returned to merchant marine service.(9) We perceive no basis in appellant's appeal for disturbing the Commandant's assessment.

(8) See 46 CFR # 5.569, wherein the suggested sanction for "[v]iolent acts against other persons (injury)" ranges from outright suspension of merchant marine documents for 4 months to revocation. The range for a violent act against another that does not result in injury is a 2 to 6-month suspension. No recommendations on sanction for violations of law are set forth.

(9) Subpart L of the Coast Guard's Marine Investigation Regulations--Personnel Action, 46 CFR Part 5, sets forth the procedures for seeking the issuance of a new license or document following a revocation. Generally, the waiting period is three years. See 46 CFR # 5.901--905 (1993).

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and
2. The Commandant's decision affirming the decision and Order of the law judge is affirmed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT, and VOGT, Members of the Board, concurred in the above opinion and order.